

or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Physical coal supply sources and ownership or control over who may access transportation of coal supplies; and

(3) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it and its affiliates have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

(f) If the Seller seeks to protect any portion of a filing from public disclosure, the Seller must make its filing in accordance with the Commission's instructions for filing privileged materials and critical energy infrastructure information in §388.112 of this chapter.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697-B, 73 FR 79627, Dec. 30, 2008; Order 769, 77 FR 65475, Oct. 29, 2012; Order 784, 78 FR 46209, July 30, 2013; Order 816, 80 FR 67108, Oct. 30, 2015; Order 819, 80 FR 73977, Nov. 27, 2015]

§ 35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or ancillary services, or that is presumed to have horizontal market power in generation or ancillary services by virtue of failing or foregoing the relevant market power screens, as described in 35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section for sales of energy or capacity or paragraph (c) of this section for sales of ancillary services or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation for sales of energy or capacity consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power for one year or more priced at a rate not to exceed embedded cost of service.

(c) Default mitigation for sales of ancillary services consist of: (1) A cap based on the relevant OATT ancillary service rate of the purchasing transmission operator; or (2) the results of a competitive solicitation that meets the Commission's requirements for transparency, definition, evaluation, and competitiveness.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 784, 78 FR 46210, July 30, 2013]

§ 35.39 Affiliate restrictions.

(a) *General affiliate provisions.* As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy or capacity must be listed in a Seller's market-based rate tariff.